



राजपत्र, हिमाचल प्रदेश

(असाधारण)

हिमाचल प्रदेश राज्यशासन द्वारा प्रकाशित

शिमला, बुधवार, 12 अक्टूबर, 1988/20 अश्विन, 1910

हिमाचल प्रदेश सरकार

ELECTION DEPARTMENT

ORDER

Shimla-171002, the 5th October, 1988

No. 3-6/88-Eln.—Whereas representations were filed to the Governor, Himachal Pradesh by S/Shri Santosh Kumar Chinara and Yudhvir Singh, President, Gram Panchayat Gahlian, both residents of Village and Post Office Dhalaur, Tehsil Dehra, District Kangra and other persons belonging to 40-Jawalamukhi Assembly Constituency against the election of Shri Ishwar Chand sitting M.L.A. from 40-Jawalamukhi Assembly Constituency and referred therein the disqualification of Shri Ishwar Chand M.L.A. ordered by the Election Commission during the year 1983 for failure to lodge the account of election expenses;

AND WHEREAS, the said representationists requested the Governor to declare the election of said Shri Ishwar Chand as illegal and consequently for his removal from the membership of the Legislative Assembly of Himachal Pradesh;

AND WHEREAS, the Governor, Himachal Pradesh considering the request in the light of the provisions contained in Article 192 of the Constitution of India referred the matter to the Election Commission of India for opinion;

AND WHEREAS, the Election Commission of India taking into account the facts and the legal position of the case have, while tendering their opinion under article 192 (2) of the Constitution, held that the disqualification of Shri Ishwar Chand, being a case of pre-election disqualification, could not be raised or decided under article 192 of the Constitution as the remedy was by way of election petition only.

Now, therefore, I, R.K.S. Gandhi, Governor of Himachal Pradesh hereby accept the opinion tendered by the Election Commission and accordingly decide that the disqualification of Shri Ishwar Chand, M.L.A. from 40-Jawalamukhi Assembly Constituency, is a pre-election disqualification which could not be raised or decided by me under the provisions of article 192 of the Constitution.

This order along with the opinion of the Election Commission is accordingly published for general information of the public.

R. K. S. GHANDHI,
Governor.

ELECTION COMMISSION OF INDIA

BEFORE THE ELECTION COMMISSION OF INDIA

REFERENCE CASE No. 4 OF 1987

[Reference from the Governor of Himachal Pradesh under article 192 (2) of the Constitution of India].

In re : *Alleged disqualification of Shri Ishwar Chand, a sitting member of the Himachal Pradesh Legislative Assembly.*

OPINION

The question whether Shri Ishwar Chand, a sitting member of the Himachal Pradesh Legislative Assembly has become subject to disqualification under article 191 (1) (e) of the Constitution by reason of his being disqualified under section 10-A of the Representation of the People Act, 1951 for a period of three years from 7-1-1983 to 6-1-1986 has been referred by the Governor of Himachal Pradesh to the Election Commission for its opinion under clause (2) of article 192 of the Constitution.

2. Shri Ishwar Chand contested and lost the election to the Legislative Assembly of Himachal Pradesh from 40-Jwalamukhi Assembly Constituency held in 1982 and as a consequence of his failure to lodge any account of election expenses, he was disqualified by the Commission under section 10-A of the Representation of the People Act, 1951 *vide* Order No. 76/HP-LA/82, dated the 7th January, 1983 for a period of three years upto and including 6-1-1986. In spite of this disqualification, in March, 1985 when the General Election to the Himachal Pradesh Legislative Assembly was held, Shri Ishwar Chand filed his nomination papers for contesting from the same constituency, namely 40-Jwalamukhi Assembly Constituency. As the above fact of

disqualification of Shri Ishwar Chand escaped the notice of the Returning Officer and as no objection was raised on this ground, Shri Ishwar Chand name was included in the list of contesting candidates and he got elected from the same Constituency. An election petition (No. 4 of 1985) was filed before the Himachal Pradesh High Court challenging Shri Ishwar Chand's election on account of certain alleged irregularities in the counting of votes, but in this petition also, the question of his above-mentioned disqualification was not raised. The election petition was dismissed by the High Court on 23-12-85. An appeal was also filed before the Supreme Court and the said appeal was dismissed by the Supreme Court on 9-1-1987.

3. From the foregoing facts, it is clear that the afore-mentioned disqualification under section 10-A of the Representation of the People Act, 1951 imposed on Shri Ishwar Chand by the Commission subsisted prior to, and was continuing on the date of, his election to the Himachal Pradesh Legislative Assembly held in March, 1985 and hence it is a case of a pre-election disqualification.

4. It is well settled that the Governor and the Election Commission have the jurisdiction under article 192 of the Constitution to enquire into and adjudicate upon only such questions of alleged disqualification of sitting members of the State Legislature to which they have become subject after their election as such members, that is to say, questions of post-election disqualifications only [vide *Election Commission v. Saka Venkata Rao* (AIR 1953 SC 210) and *Brundaban Naik v. Election Commission* (AIR 1965 SC 1892)]. Questions of pre-election disqualification can be raised only by means of an election petition.

5. In view of the above said position of law and undisputed facts of the present case, I am of the opinion and accordingly hold that disqualification of Shri Ishwar Chand, being a case of pre-election disqualification, could not be raised before, or decided by the Governor of Himachal Pradesh in terms of article 192 of the Constitution and, consequently, the Election Commission has also no jurisdiction to express any opinion on the question of such disqualification. 'The reference received from the Governor of Himachal Pradesh is, therefore, returned hereby with my opinion to the above effect.'

6. Before parting with the case, however, I would like to reiterate the observations made by the Commission in its opinions to the Governor of Uttar Pradesh in Reference Case Nos. 2 and 3 of 1984 to the effect that there appears to be no forum before which a question may be raised of a pre-election disqualification of a member which subsists even after the election of the member concerned in the event of failure for any reason to agitate such question by means of an election petition within the prescribed period. The Commission has already brought this to the notice of the Central Government. The Commission has no information as to any case of the present type having been dealt with under article 193 of the Constitution. It is also pertinent to mention that SLP Nos. 8778, 6898 and 12011 to 12013 of 1984 [Dharmendra Sankhyadhar, etc., vs. State of Uttar Pradesh, etc.] which arose out of the Commission's opinions to the Governor of Uttar Pradesh in the above referred Reference Case Nos. 2 and 3 of 1984, are pending before the Supreme Court and that the Court has already issued notices to the Attorney General of India and the Advocates-General of various States.

R. V. S. PERI SASTRI,
Chief Election Commissioner of India.

NEW DELHI :

13th September, 1988.

